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No. 97-927

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FELIX A. OLIVIERI,
Petitioner,
v.
MATT L. RODRIGUEZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

BRIAN L. CROWE
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MEERA WERTH
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Respondent
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a public employer deprives an at-will employee of liberty without due process of law by discharging him for a potentially stigmatizing reason but does not disclose that reason to any third party or take any steps to prevent the discharged employee from finding a position with another employer.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-6) is reported at 122 F.3d 406. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 8-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the court of appeals was entered on August 15, 1997.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive

any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

STATEMENT

In August 1994, petitioner Felix A. Olivieri was discharged as a probationary police officer undergoing training at the police academy of the Chicago Police Department. Pet. App. 8. During the course of his training at the academy, two other probationary officers filed allegations of sexual harassment against petitioner. R. 45 ¶ 4. Following an investigation, respondent Matt L. Rodriguez —then the Superintendent of the Chicago Police Department—discharged petitioner. Pet. App. 8. After his discharge, petitioner sought employment with other police departments, informing them that he had been discharged because of an allegation of sexual harassment. *Id.* at 8-9. Petitioner's stepmother—herself a police officer—inquired into the possibility of employment for petitioner with yet other law enforcement agencies. *Id.* at 9. She also ininformed each that petitioner had been terminated due to allegations of sexual harassment. *Ibid.* Petitioner was not hired by any of these prospective employers. *Ibid.* Petitioner has no reason to believe that Superintendent Rodriguez or any other employee of the Chicago Police Department has informed any potential employer of the reason for his discharge. R. 44, Exh. E at 37, 42, 52, 56-57, 67, 71, 90-91; R. 45 ¶¶ 9-10.

Petitioner brought this suit alleging a deprivation of liberty without due process of law and seeking relief under 42 U.S.C. § 1983. Pet. App. 9. Superintendent Rodriguez sought summary judgment, observing that there was no evidence that he or anyone else within the Chicago Police Department had disclosed any stigmatizing information about petitioner. Pet. App. 11. The district court granted respondent's motion for summary judgment on that basis. *Id.* at 11-13.

The court of appeals affirmed. The court observed that making a defamatory charge about an at-will public employee is not considered in itself to invade a constitutionally protected liberty interest, but that "when the character and circumstances of the defamation are such as to have 'foreclose[d] [the employee's] freedom to take advantage of other employment opportunities' he can bring suit based on the deprivation of his liberty of employment or occupation." Pet. App. 2 (quoting *Paul v. Davis*, 424 U.S. 693, 710 (1976) (first set of brackets in original)). In this case, however, there was "no evidence that the defendant disclosed to anyone the grounds of the plaintiff's discharge." *Ibid.* The court added that, although petitioner and his stepmother may have voluntarily disclosed defamatory material to prospective employers, that voluntary decision was not a deprivation of liberty by the Superintendent. See *id.* at 3-4. Beyond that, the court noted that petitioner's position was tantamount to a holding that the Due Process Clause forbids at-will public employment because whenever an at-will employee is discharged he can claim that that discharge is stigmatizing, even if his former employer takes no action to inhibit prospective employers from hiring the former employee. See *id.* at 4.

ARGUMENT

In this case the Chicago Police Department did no more than discharge a probationary, at-will employee. Since at least *Bishop v. Wood*, 426 U.S. 341 (1976), it has been settled that the discharge of an at-will public employee does not deprive the employee of a constitutionally protected liberty or property interest within the meaning of the Due Process Clause even when the employer discharges the employee for a stigmatizing and allegedly false reason, as long as the employer does not publicly disclose the reason for the discharge. See *id.* at 348-49. Nevertheless, petitioner contends that because he felt compelled to disclose the reasons for his termination to prospective em-

ployers, his discharge should be compared to cases in which the government intentionally releases stigmatizing information that has the effect of foreclosing the plaintiff from obtaining other employment. But precisely because the Chicago Police Department took no action that affected petitioner's future employment prospects other than discharging him, that argument lacks merit. And while petitioner is correct that other circuits have reached a different result, petitioner does not explain why the rule followed in other circuits would benefit him, nor why this conflict has sufficient practical consequences to warrant this Court's review.

1. Petitioner does not question the holding of *Bishop v. Wood* that the discharge of a nontenured public employee—even for a stigmatizing and allegedly false reason —does not deprive the employee of a constitutionally protected liberty interest absent some disclosure of the reason for the discharge. Contrary to petitioner's assertion, this case is not like *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). That case involved a state's decision to preclude the plaintiff from any employment whatsoever in his chosen profession. Here, of course, petitioner remains free to seek employment with other law enforcement agencies, who in turn remain free to make their own decisions on petitioner's application on its merits.

No doubt for this reason, petitioner quickly abandons *Schware* and turns to dicta in *Board of Regents v. Roth*, 408 U.S. 564 (1972), which explains that a public employee would be deprived of a protected liberty interest if "the State, in declining to re-employ respondent imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573. See Pet. 2-3. Of course, this dicta must be read in light of the subsequent holding in *Bishop v. Wood* that the termination of a nontenured public employee, without more, is not sufficiently stigmatizing to amount to a deprivation of liberty within the meaning of

the Due Process Clause. And, of course, any other result would mean that the Due Process Clause in effect forbids at-will public employment. If the mere termination of an at-will employee were considered so stigmatizing as to trigger the constitutional requirement for a hearing, then no public employee could be discharged except for cause and after a hearing.

Petitioner claims that he is compelled to disclose stigmatizing information if he is to respond truthfully to prospective employers who inquire about why he was discharged from the Chicago Police Department. See Pet. 4. On that score, petitioner is little different from any other nontenured public employee who, after his discharge, must parry questions from prospective employers about his employment history. Any time a nontenured employee is fired, that termination will have some adverse effect on the terminated employee's future employment prospects, yet that amorphous and speculative effect was insufficient to amount to a deprivation of a protected liberty interest in *Bishop v. Wood*. As the court of appeals pointed out here, whether petitioner will in effect be compelled to disclose defamatory information about himself is uncertain—he is under no obligation to reveal any particular information to a prospective employer. See Pet. App. 3-4.

Moreover, petitioner's position cannot be squared with the settled rule that an individual has not been deprived of liberty or property within the meaning of the Due Process Clause unless the defendant intends to deprive the plaintiff of liberty or property, or, at a minimum, acts with reckless disregard for the risk that such a deprivation will occur. See, *e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986). Here, there is no claim that the Chicago Police Department discloses the reasons it has terminated probationary employees to prospective employers, or indeed treats such information as anything other than highly confidential. Accordingly, there is no claim in this case that could support a finding that Superintendent Rod-

riguez or anyone else in the Chicago Police Department intends to prevent petitioner from obtaining alternative employment within law enforcement, or even has recklessly jeopardized his chances of obtaining such employment. If petitioner and his stepmother have chosen to jeopardize his future in law enforcement by voluntarily revealing stigmatizing information to prospective employers, that decision cannot be attributed to the Superintendent. As the court of appeals recognized, "there is a qualitative difference, bearing on culpability, between publicizing a stigmatizing ground of dismissal and refusing to do so, that [petitioner's] position would erase." Pet. App. 4.

Finally, petitioner's proposed rule leads to anomalous results. By focusing on stigma, petitioner presumably creates a system under which nontenured employees who are terminated for no particularly stigmatizing reason—or even for no reason at all—have no constitutional entitlement to a hearing. And this dichotomy exists even though an employer discloses nothing to prospective employers about the reasons for a nontenured employee's termination, and thus provides no basis for distinguishing between employees who are terminated for stigmatizing reasons and those who are not. Surely the Due Process Clause should not be held to have abolished at-will employment only for those employees who engage in serious misconduct, especially when prospective employers cannot distinguish between such employees and other nontenured employees who have been fired. Such a rule makes no sense, and as the Court recognized in *Bishop v. Wood,* could only "penalize forthright and truthful communication between employer and employee . . . ." 426 U.S. at 348-49. And to avoid claims that would arise from a discharge of an at-will employee for a reason that would be stigmatizing if disclosed, public employers may resort to concealing the reason for discharge even from the employee himself. Ultimately, not even the employee would benefit from such a system.

2. Petitioner correctly observes that at least three circuits have held that a public employer is deemed to have disseminated stigmatizing information for purposes of a due process claim whenever the plaintiff can show that "stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." *Donato v. Plainview-Old Bethpage Central School District*, 96 F.3d 623, 631-32 (2d Cir. 1996) (quoting *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 45 (2d Cir. 1987)), cert. denied, 117 S. Ct. 1083 (1997). Accord *Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980). See Pet. 3. Petitioner's reliance on this conflict as a basis for plenary review is misplaced for two reasons.

First, it is far from clear that the law of any circuit would benefit petitioner. There is no evidence in this record that the Chicago Police Department has ever disclosed potentially stigmatizing information from the personnel file of a nontenured employee to another prospective employer, much less that the Department is "likely" to do so. In *Buxton*, for example, the stigmatizing information was placed in public records available to potential employers. See 871 F.2d at 1045. In *Ledford* the court concluded that "plaintiff has alleged that certain false information has been circulated and will continue to be circulated to prospective employers." 612 F.2d at 887. Here, the record is clear that petitioner and his stepmother made all the disclosures at issue. Hence, there is no reason to think that petitioner would prevail even in those circuits that have adopted a rule different from that employed by the Seventh Circuit.

Second, the practical significance of this split in the circuits is at best unclear. At most, public employers in circuits that have rejected the Seventh Circuit's approach need only adopt procedures designed to ensure that no adverse information about a former employee is communicated to prospective employers. Employers might, for

example, omit the reasons for a nontenured employee's discharge from the personnel file, or refuse to respond to requests for information from prospective employers. To be sure, that result is far from optimal, but that is a problem for employers, not terminated employees. Similarly, it is unclear that the practical significance of requiring employers either to provide name-clearing hearings or to refuse to share information from their personnel files is so great as to warrant this Court's intervention. Certainly petitioner does not explain why the conflict in the circuits he identifies is of such overwhelming importance that it warrants this Court's exercise of its discretionary jurisdiction to hear this case. Indeed many employers—including the City of Chicago—routinely refuse to provide any information about former employees other than to confirm dates of employment, precisely to avoid litigation. And in the absence of a showing that the conflict in the circuits has created serious practical problems for employers, plenary review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN L. CROWE
Corporation Counsel of the
City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MEERA WERTH
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Respondent

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* Counsel of Record